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whole book is valuable, not only to prison officers, but to legislators also, and to all others interested in the solution of the prison question.

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THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW. BY CHRISTOPHER G. TIEDEMAN, A.M., LL.B., Professor of Law in the University of Missouri. Pp. 165. New York and London: G. P. Putnam's Sons, 1890.

WE have in this work the first general and systematic discussion of the unwritten elements of our national constitution. The author, however, in the narrow space which he has allowed himself, has not been able to cover the entire field comprehended by the title of his book. Broad phases of his subject are scarcely noticed. Thus, for example, no attempt is made to trace the vast though silent expansion of the powers of Congress, through which the carefully contrived "checks and balances" of the written instrument have been practically destroyed. But so far as constitutional growth is due to executive action or the interpretation of the courts, the author's treatment is thorough; and by pointing out the legal and historical justification of that growth he has rendered an original and important service. It would be difficult anywhere else to find so philosophic an explanation of the doctrine of implied powers.

In the first two chapters Professor Tiedeman lays down and develops his major premise. Except in the matter of present form, the statement of Blackstone is false, that municipal law "is a rule of conduct prescribed by the supreme power of the State;" and not less misleading is the view of Austin, that a legal rule only then becomes a law when an English or American court first announces its decision. Law is not originally handed down from above. It grows with the ethical progress of the race,

long before there are legislatures to determine its form or courts to define its application. A legal rule, therefore, "is the product of social forces, reflecting the prevalent sense of right." It follows that if a statute does not give expression to such a *Rechtsgefühl*, it will prove a dead letter; and if anywhere, as on the frontier, government does not exist or is in abeyance, self-help may legally be employed. "If a man is murdered or a horse stolen in such a community, and the offender is captured by the vigilance committee, tried by Judge Lynch, and punished in accordance with the custom of the country, he has suffered the penalty of the law" as much as the individual who, in a more civilized community, is tried and punished in the prescribed manner. "The only difference between the two cases is the degree of development in the administration of the law." For the same reason "bench-legislation" may be legally justified. Ordinarily public sentiment requires a rigid adherence to the rule *stare decisis*; but this rule "is absolutely binding only as it also reflects the prevalent sense of right."

A constitution is likewise the product of social evolution. Its fundamental principles cannot be created by governmental or popular edict; they "are necessarily found imbedded in the national character." Thus the constitution of the United States is mainly a sequential development of English institutions. It has, however, several new elements. Of these the most important are the peculiar character of the federal State; the power of the supreme court to declare acts of the legislature void; and the doctrine that all governmental agencies are the creatures of the popular will, to which belongs the residuum of power. Only the most general elements of our constitution are written. Here, as elsewhere, the real living principles, the "flesh and blood, instead of the skeleton," are unwritten. Accordingly there may be a conscious development in constitutional principles, whether recorded in judicial opinion or not, which will be legally

justifiable so long as it proceeds in harmony with public sentiment. This is the key-note to the very suggestive treatise which follows.

Seven chapters are devoted to an examination of the principal decisions and administrative acts which mark the growth of our unwritten constitution. Not even an outline of them can here be given. It will perhaps be enough to say that the argument is vigorous, unusually clear, and generally convincing. Most original, probably, is the discussion of State sovereignty and the right of secession. Rejecting all previous definitions, the author declares that with us the sovereign is the "aggregation of individuals who do now possess the supreme power of the land." Hence the written constitution could not "locate the sovereignty of the country." Whether it was lodged in the federal Union or in the individual States remained in doubt until the question was determined by the court of arms.

Consistently with his premises the author concludes his discussion by exposing the fallacy of two popular theories. The government of the United States, notwithstanding the view commonly held since the adoption of the tenth amendment, is not strictly one of enumerated powers. On the contrary, powers prohibited to the States, but neither prohibited or delegated to the general government, may justly be exercised by the latter. "For it would be impossible to conduct a government no branch of which can exercise a necessary power, unless it has been granted." Again, the so-called cardinal rule of interpretation, as generally understood, leads to strained and illogical constructions. The intention of the law-giver should indeed be respected. But the "real law-giver is not the man or body of men which first enacted the law ages ago; it is the people of the present day who possess the political power." That interpretation should prevail which best reflects the existing sense of right. The judge "must find out what the possessors of political power now mean by the written word."

Professor Tiedeman has made a scholarly contribution to institutional science; and his book will be heartily welcomed by educators as a needed complement to the works of Wilson, Cooley, and Bryce.

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THE NEW YORK REFORMATORY IN ELMIRA. By ALEXANDER WINTER, with Preface by HAVELOCK ELLIS. Pp. x, 172. London: Swan, Sonnenschein & Co., 1891.

MR. ALEXANDER WINTER's book on the Elmira Reformatory is an important contribution to penological literature. The fact that it is published simultaneously in England and Germany indicates the increasing interest abroad in this remarkable institution.

The preface is by Mr. Havelock Ellis, author of *The Criminal*, in the "Contemporary Science Series." He says: "It has not been on the old continent that the practical treatment of the criminal has of late years received its chief impulse. For the epoch-making period we must turn to the United States."

Mr. Winter's book presents the most complete and sympathetic description of the Elmira Reformatory that has yet been published. He describes in detail the reformatory treatment used in the institution; the diagnosis of the physical, intellectual, and moral condition of each inmate upon entrance; his assignment to school and industrial work; the mark system, and the process of promotion from grade to grade.

Mr. Winter brings out the fact, which is sometimes not sufficiently understood, that a release from the Elmira Reformatory does not depend solely upon the record made. He says: "The qualification for discharge necessitates not only unexceptionable conduct and fulfilment of rules, but a certain assurance that the criminal has actually become a converted and better man, and both can